

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM MAHONEY	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD T. VAUGHN, Superintendent,	:	
Graterford SCI, THE DISTRICT	:	
ATTORNEY OF THE CITY OF	:	
PHILADELPHIA and THE ATTORNEY	:	
GENERAL OF THE STATE OF	:	
PENNSYLVANIA	:	NO. 00-606

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

January 19, 2001

Petitioner William Mahoney ("Mahoney") filed a petition for writ of habeas corpus challenging his 1984 felony-murder conviction based upon the ineffectiveness of his trial counsel for counsel's failure to object to: (1) the trial court's felony-murder charge; (2) the trial court's jury charge or absence of an instruction requiring the jury to be unanimous on the voluntariness of his confession; and (3) the admissibility of a portion of an expert witness' testimony. Mahoney also alleged that his post-trial and appellate counsel were ineffective for failing to raise the above issues on appeal.

Magistrate Judge Arnold C. Rapoport filed a Report and Recommendation ("R & R") on September 26, 2000, to deny and dismiss the petition and find no probable cause to issue a certificate of appealability. Petitioner filed objections; defendants filed a response. After de novo consideration, the

petition for writ of habeas corpus is denied and dismissed.

### Background

Petitioner shot the victim, Sidney Eick ("Eick"), in the head while trying with two others to rob Eick of methamphetamine. Eick died several weeks later of a gun shot wound to the head. Petitioner was convicted by a jury of second degree murder (felony-murder), robbery, burglary and possession of an instrument of crime, in the Court of Common Pleas of Philadelphia County on March 23, 1984. On March 7, 1985, petitioner was sentenced to life imprisonment for murder, a consecutive term of ten to twenty years for robbery, a concurrent term of ten to twenty years for burglary and a consecutive term of two and one-half to five years for the weapons charge.

Petitioner, appealing to the Pennsylvania Superior Court, alleged that he was entitled to a new trial because: (1) the jury improperly heard testimony regarding prior criminal acts; (2) the jury was improperly "death qualified"; and (3) two police officers unconstitutionally referred to petitioner's decision to remain silent. He also alleged the trial court erred in denying his motion to dismiss pursuant to Pa. R. Crim. P. 1100. The Superior Court affirmed the judgment of sentence on February 10, 1986. The Pennsylvania Supreme Court denied petitioner's request for discretionary review on October 22, 1986.

Petitioner, aided by new counsel, filed a petition for

collateral relief under the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. § 9541, et seq., on November 13, 1996. His petition alleged that trial counsel was ineffective for failing to argue that: (1) the jury instruction for felony-murder should have stated that the killing must have been "in furtherance" of the felony; (2) the jury should have been instructed that the Commonwealth bore the burden of proving the voluntariness of the petitioner's confession by a preponderance of the evidence and it must unanimously find the confession to have been voluntary; and (3) the medical examiner's opinion regarding the cause of death was objectionable and inadmissible. Petitioner also alleged that appellate counsel was ineffective for failing to raise the same issues on appeal, and that a life sentence was illegal under state law. The PCRA petition was denied on December 3, 1997. The Superior Court affirmed the denial on June 3, 1999. The Supreme Court denied a petition for discretionary review on October 4, 1999.

Petitioner filed this action for habeas relief on February 2, 2000. Petitioner objected to the legal conclusions contained in the Report and Recommendation of Magistrate Judge Rapoport, and seeks de novo review in the district court.

### **Discussion**

#### **A. Standard of Review**

The Antiterrorism and Effective Death Penalty Act of 1996

("AEDPA"), Pub. L. 104-132, 110 Stat. 1218 (enacted April 24, 1996) applies.<sup>1</sup> The AEDPA amended 28 U.S.C. §2254, under which this petition was filed, to give greater deference to a state court's legal determinations. Under Matteo v. Superintendent, SCI Albion, 171 F.3d 877 (3d Cir. 1999) (en banc), cert. denied, Matteo v. Brennan, 528 U.S. 824 (1999), a two-step analysis is required. First, the federal court must determine whether the state court's decision was contrary to Supreme Court precedent. Id. at 891. Second, if the state court's decision was not contrary to Supreme Court precedent, the court must determine whether the state court decision represents an unreasonable application of Supreme Court precedent. Id.

**B. Ineffective Assistance of Counsel**

All petitioner's claims are allegations of ineffective assistance of counsel. Claims for ineffective assistance of counsel must be evaluated under the two-part test set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, petitioner must show that "counsel's representation fell below an objective standard of reasonableness." Id. at 688. Then, petitioner must

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<sup>1</sup>28 U.S.C. 2254(d), as amended by the AEDPA, "unquestionably appl[ies] . . . to [habeas] cases filed after the Act took effect." Lindh v. Murphy, 521 U.S. 320, 335 (1997). See also Matteo v. Superintendent, SCI Albion, 171 F.3d 877 (3d Cir. 1999) (applying 28 U.S.C. §2254(d), as amended by the AEDPA, to a 1996 petition for writ of habeas corpus of a prisoner convicted in September, 1988). Mahoney's habeas petition was filed on February 2, 2000, well after the AEDPA took effect.

show that counsel's performance prejudiced the petitioner by depriving the petitioner of a fair trial. Id. at 687. Put another way, petitioner must show that but for counsel's unreasonable errors, the result of the proceeding would have been different. Id. Under Strickland, counsel cannot be ineffective for failing to raise meritless claims.

1. **Ineffectiveness of trial counsel for failing to object to the court's felony-murder charge that omitted the "in furtherance" element.**

The petitioner's first claim is that trial counsel was ineffective for failing to object to the trial court's charge on the elements of felony-murder because the court did not instruct that the homicide must have been "in furtherance of the felony." The Superior Court, reviewing Mahoney's conviction, found that there was no error of state law because "in furtherance of the felony" is not an element of second degree murder. Commonwealth v. Mahoney, No. 5119 (Pa. Super. filed June 3, 1999).

Second degree murder is defined as criminal homicide when "committed while defendant was engaged as a principle or an accomplice in the perpetration of a felony." 18 Pa. C.S.A. § 2502(b). Although not expressly stated in the statute, the "in furtherance" aspect is an element of the crime of felony-murder. See Commonwealth v. Redline, 137 A.2d 472, 476 (Pa. 1958) ("It is necessary \* \* \* to show that the conduct causing death was done in furtherance of the design to commit the felony. Death must be

a consequence of the felony \* \* \* and not merely coincidence.'")(quoting Hitchler, The Killer and His Victim in Felony-Murder Cases, 53 Dick. L. Rev. 3 (1948)). See also Commonwealth v. Johnson, 485 A.2d 397, 401 (Pa. Super. Ct. 1984)("if there is evidence that . . . [the defendant's act was not in furtherance of the [felony], then there [is] insufficient evidence to convict appellant of murder."); Commonwealth v. Rawls, 477 A.2d 540, 543 (Pa. Super. Ct. 1984)(under the felony-murder doctrine, the killing "must be accomplished in furtherance of the intentional felony.").

Pennsylvania Supreme Court decisions make clear that, "in furtherance of" is an element of the crime and it was an error of state law not to instruct the jury that it must find that Mahoney shot (and killed) Eick in furtherance of the felony. However, federal habeas relief does not lie for mere errors of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

But it was also a violation of the Due Process Clause of the Fourteenth Amendment to convict Mahoney of the felony-murder charge without a jury finding the killing was "in furtherance" of the felony. See Fiore v. White, -- S. Ct.--, 2001 WL 15674, \*2 (January 9, 2001) ("We have held that the Due Process Clause of the Fourteenth Amendment forbids a state to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt."). In Fiore, the Court cited In re Winship,

397 U.S. 358, 364 (1970), and Jackson v. Virginia, 443 U.S. 307, 316 (1979). Winship considered whether proof beyond a reasonable doubt was required in a juvenile proceeding in which the defendant was charged with an act which would have constituted a crime if committed by an adult. In holding the reasonable doubt standard applied, the Court stated that, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364.

The Jackson opinion is even more apt here. In that case, the Court determined the Winship standard applied in a federal habeas corpus proceeding when the defendant claimed he was convicted by the state without sufficient evidence. Jackson, 443 U.S. at 313-14. The Court held that proof of premeditation or the specific intent to kill was essential to convict a defendant of first degree murder in Virginia. Id. at 309. Reaffirming the holding in Winship, the Court again asserted that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Id. at 316.

The Court has continued to reaffirm this rule. In 1993, the Court stated, "[t]he prosecution bears the burden of proving all elements of the offense charged and must persuade the

factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." Sullivan v. Louisiana, 508 U.S. 272, 277-78 (1993).

In 1995, the Court was asked to determine "whether it was constitutional for the trial judge to refuse to submit the question of 'materiality' to the jury [in a case brought under 18 U.S.C. §1001, in which one of the elements is falsifying, concealing or covering up a material fact]." United States v. Gaudin, 515 U.S. 506, 507 (1995). The Court again stated "that [the Fifth and Sixth Amendments] require criminal convictions to rest on a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Id. at 510 (citing to Sullivan, 508 U.S. at 277-78).

The Court reiterated again last year that, "[t]aken together, the[] rights [announced in the 6<sup>th</sup> and 14<sup>th</sup> amendments to the Constitution] indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Apprendi v. New Jersey, 120 S. Ct. 2348, 2355-56 (2000) (quoting Gaudin, 515 U.S. at 510).

It was a Constitutional violation to omit the "in furtherance of" element of the felony-murder charge at Mahoney's trial, but the "harmless error" standard applies. Habeas

petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), reh'g. denied, 508 U.S. 968 (1993). Only if a federal judge in a habeas proceeding is in grave doubt whether a trial error of federal law had substantial or injurious effect or influence in determining the jury's verdict, is the error harmless. See O'Neal v. McAninch, 513 U.S. 432, 437 (1995); Yohn v. Love, 76 F.3d 508, 523 (3d Cir. 1996).

The felony-murder victim, Eick, died from a gun shot wound to the head several weeks after being shot. See R & R at 5. Mahoney admitted going to Eick's house to rob him, id. at 6, and that he used the .22 gun the police found in Mahoney's car to scare Eick, (but not to shoot him), id. at 7. The trial court erred in failing to instruct the jury that it must determine beyond a reasonable doubt that Eick was killed in furtherance of the robbery to convict Mahoney of the crime of felony-murder, but in light of the established facts, such error was harmless. The court has no doubt the jury would have found the homicide was committed in furtherance of the underlying felony, so there was no actual prejudice.

Although trial counsel's failure to object to the jury charge on the felony-murder count "fell below an objective standard of reasonableness" because the charge omitted the

instruction that the jury must find Mahoney committed the murder in furtherance of the underlying felony to find him guilty of the crime of felony-murder, Strickland, 466 U.S. at 688, petitioner has not shown that but for trial counsel's error, the result of the trial would have been different, id. at 694. Mahoney's petition for writ of habeas corpus on the ground that trial counsel was ineffective for failing to object to the trial court's felony-murder charge will be denied.

2. Ineffectiveness of counsel for failing to object to the jury instructions, omitting a charge that the jury had to determine unanimously whether petitioner's confession was voluntary.

Petitioner argues that since his confession was the only evidence linking him to the crime, his trial counsel was ineffective for failing to object to the court's charge omitting the burden of proof on the voluntariness of the confession and the need for unanimity on the issue. A court must find a statement voluntary, but the Constitution does not require the jury to rule on voluntariness. See Lego v. Twomey, 404 U.S. 477, 489-90 (1972). The trial court found the confession voluntary at a pre-trial suppression hearing. Since a jury did not need to determine voluntariness, there was no need to charge on unanimity. Counsel was not ineffective for failing to make this frivolous objection to the jury charge.

3. Ineffectiveness of counsel for failing to object to the admissibility of expert testimony without a "beyond a reasonable doubt" foundation for the expert's opinion.

Petitioner contends that the failure of trial counsel to object to the pathologist's opinion on the cause of death diluted the Commonwealth's Constitutional burden of proof on causation because the court did not require the opinion to have a "beyond a reasonable doubt" foundation. Petitioner argues that the doctor's testimony did not contain the words "to a reasonable degree of medical certainty," so there were insufficient grounds for his expert opinion. The Superior Court rejected this argument. The petitioner argues that causation is an element of the crime of murder and therefore the Commonwealth failed to meet its burden of proof on that issue. Commonwealth v. McCloud, 457 Pa. 310, 312 (1974). While it is the Commonwealth's burden to prove beyond a reasonable doubt every element of the crime charged, in light of the facts established at trial, the harmless error standard precludes habeas relief on this ground as well. The court has no doubt the omission of the words "to a reasonable degree of medical certainty" had no substantive or injurious effect on the jury's verdict. This claim will be denied.

4. Ineffectiveness of appellate counsel for failure to raise each of the above claims on appeal.

Petitioner argues that post-trial and appellate counsel were ineffective for failing to raise the claims mentioned above. Counsel cannot be ineffective for failing to raise meritless claims. See Strickland, 466 U.S. at 697. This claim will also be denied.

### **Conclusion**

Petitioner's objections raise the same claims as the original petition for habeas relief. All claims asserted are insufficient to grant petitioner habeas relief. The petition for a writ of habeas corpus will be denied and dismissed. There is no probable cause to issue a certificate of appealability.

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PENNSYLVANIA : NO. 00-606

ORDER

AND NOW, this 19<sup>th</sup> day of January 2001, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport, and the petitioner's objections thereto, IT IS ORDERED that:

1. The petition for a writ of habeas corpus is **DENIED** and **DISMISSED**.

2. There is no probable cause to issue a certificate of appealability.

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S.J.